BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KEVIN HINDS	)	
Claimant	)	
VS.	)	
	)	
EXCELLENCE IN DRYWALL	)	Docket No. 1,059,822
Respondent	)	
AND	)	
	)	
CHARTER OAK FIRE INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent requests review of Administrative Law Judge Thomas Klein's March 1, 2013 preliminary hearing Order. Gary K. Albin of Wichita, Kansas, appeared for claimant. William L. Townsley of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

Respondent argues claimant was impaired due to use of marijuana and such impairment contributed to his February 21, 2012 injury. Judge Klein's March 1, 2013 Order indicated a urine test was done in the normal course of medical treatment and within a reasonable time of claimant's work injury. However, Judge Klein ruled claimant's drug test results inadmissible for a number of reasons:

- it was unknown who took and labeled the sample, including if it was performed by or under the direction of a licensed health care professional;
- foundation evidence did not establish beyond a reasonable doubt that the sample was from the claimant; and
- no split sample was made available to claimant.

Judge Klein further found that claimant did not refuse a chemical test under K.S.A. 2011 Supp. 44-501(b)(1)(E) or a medical examination under K.S.A. 2011 Supp. 44-518. Judge Klein found claimant's case compensable.

The record on appeal is the same as that considered by Judge Klein and consists of the April 5, 2012 Motion Hearing transcript, with exhibits; the May 24, 2012 Preliminary Hearing transcript, with exhibits; the January 21, 2013 Larry Hatfield and Heather Cox deposition transcripts with exhibits; and the February 19, 2013 Preliminary Hearing transcript, with exhibits; and all pleadings contained in the administrative file.

ISSUES

Respondent argues Judge Klein erred in finding the drug test results were inadmissible to prove claimant's impairment and that such impairment contributed to his injury. Respondent argues all benefits should be forfeited based on claimant's refusal to submit to a confirmation GCMS drug test.

Claimant requests the Board affirm Judge Klein's Order in its entirety.

The issues before the Board are:

(1) Does K.S.A. 2011 Supp. 44-501(b) bar claimant from recovering benefits under the Kansas Workers Compensation Act?

(2) Did claimant refuse to submit to a chemical test or medical examination, either under K.S.A. 2011 Supp. 44-501(b)(1)(E) or K.S.A. 44-518, such that benefits should be denied?

FINDINGS OF FACT

Claimant was employed by respondent to hang sheetrock.[1] He fell and struck his head while working on a scaffold his first day on the job with respondent, February 21, 2012. Respondent attempted to ascertain if claimant had a serious injury. Claimant initially seemed to be in good health. He was sent home, but respondent sent another employee to watch him. Claimant later became combative and was taken by ambulance to Via Christi Hospital where he was diagnosed with a fractured skull and a right frontal subdural hematoma. Claimant underwent an emergency right craniotomy.

A wide array of laboratory tests were performed, including urine screening, which was positive for benzodiazepine of at least 220 ng/ml and cannabinoids of at least 50 ng/ml. More specific gas chromatography-mass spectroscopy (GCMS) testing was not performed. Based on statements of counsel, the hospital refused to proceed with the GCMS test without claimant's permission or a court order.

Respondent filed an Ex Parte Motion For Drug Testing on March 2, 2012, requesting the authority to collect a second urine sample from claimant and for GCMS testing on each sample. Judge Klein, in an Order dated March 2, 2012, denied respondent's request for the collection of a second sample, but ordered the preservation of the original sample. No decision was made at that time on respondent's request to perform the additional GCMS testing on the original sample.

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[1] Respondent asserted claimant was an independent contractor, not an employee, but that such defense was not being raised at any of the hearings as a defense against compensability.

Claimant's attorney entered his appearance on March 21, 2012 and made demand for temporary total disability and medical benefits. On March 26, 2012, respondent filed a Motion For Confirmation Drug Testing, requesting that GCMS testing be performed on the original urine sample. Respondent's motion, along with the issues raised by claimant with the filing of his E-3, went to hearing before Judge Klein on May 24, 2012. During the hearing, Judge Klein indicated the urine screen was clearly administered for reasons related to the health and treatment of claimant. Judge Klein found the claim compensable in his June 7, 2012 Order, noting that the drug test results did not prove respondent's intoxication defense. Respondent appealed to the Board, arguing that claimant was not entitled to workers compensation benefits because he refused to do confirmation testing in violation of K.S.A. 2011 Supp. 44-501(b)(1)(E).

A single Board Member issued a September 5, 2012 Order, finding claimant's refusal to permit the additional testing had potential ramifications under K.S.A. 2011 Supp. 44-501(b)(1)(E), as well as under K.S.A. 44-518. The Board Member declined to rule on the refusal issue, instead remanding such issues back to Judge Klein. The Board Member indicated that Judge Klein did not have jurisdiction to order Via Christi to test the blood sample using GCMS, but had the authority to order claimant to provide authorization and consent to Via Christi to perform such testing. The Board Member also ordered that claimant was to provide consent to such testing.

On October 30, 2012, Judge Klein issued an Order for Drug Testing, ordering Via Christi Hospital to obtain quantitative testing on the urine sample. The hospital was to utilize an appropriate chain of custody record to ensure the sample tested was the same as the sample previously obtained from claimant. A split sample from the initial sample was to be retained for claimant to test independently within 48 hours of a positive test. The test was to be completed within 48 hours of the court's Order.

GCMS confirmation testing of the urine sample was performed on November 5, 2012. The testing did not detect benzodiazepine, but confirmed the presence of 48 ng/mL of Carboxy-THC.[2]

Larry Hatfield, manager of the core laboratory of Via Christi Wichita Hospitals, testified on January 21, 2013. Mr. Hatfield has a Bachelor of Science degree in biology and is certified through the American Society of Clinical Pathology. He is not a licensed health care professional. Mr. Hatfield acknowledged that the lab is not made aware of why a physician orders a drug screening. Screening for drugs of abuse is only done when a physician orders it. Mr. Hatfield was unable to say why a urine screen was performed, other than that a doctor issued an order.

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[2] Claimant's GCMS test confirmed this level of Delta-9-tetrahydrocannabinol-9-carboxylic acid, or THC or cannabinoids. (Hatfield Depo. at 47-48).

Mr. Hatfield testified the lab utilizes a multi-phase process for identifying and segregating lab specimens. When an order for testing comes in from a physician, it is placed in the Hospital Information System (H.I.S.), which is interfaced to the Laboratory Information System (L.I.S.). From there, an L.I.S. hand-held device is used to scan the arm band, identify the patient, and print a label for the specimen container. The label is placed on the specimen container. Once the specimen is obtained, the container gets closed and sent to the lab. Each label contains a case number which is unique to the patient, a separate order number that is specific to the specimen, and a medical record number (MRN) which identifies the patient. While he does not know who collected claimant's specimen, he stated it would have been a nurse since the sample was taken from a urine catheter. He indicated all nurses are trained on how to collect, identify and use the L.I.S. hand-held device to scan the arm band.

Mr. Hatfield did not personally conduct the testing on claimant's sample nor does he have firsthand knowledge of how the testing was done. He acknowledged that when screening for drugs of abuse, there is the possibility that one out of every four samples could be a false positive. He indicated when testing a urine specimen, the specimen is put in a chemistry instrument that is capable of running the test, and the bar code with the order number follows the specimen all the way through. The instrument will read the bar code that is interfaced to the L.I.S. and generate the results. The L.I.S. system shows the type of specimen, how it was obtained, the time it was obtained, who collected it, the time it was actually received in the lab, who received it, the time reported, and what the values were. If a specimen tests positive, it is kept in its original container so it continues to have the patient demographics and order number. It is then placed in a freezer for six months.

Mr. Hatfield testified there is some degradation that occurs with a urine sample after six months. However, they have found through research and testing that it is stable for at least a year, if not longer. If degradation occurs, it is possible that the actual result given might be a lower value than what was in the specimen when it was obtained. If they receive an order to retain the sample as in this case, they segregate the specimen by placing it in a different freezer. Claimant's urine specimen was stored for nine months before Judge Klein ordered it to be sent to Affiliated Medical Services Laboratory (AMS) for GCMS confirmation testing.

Mr. Hatfield testified GCMS confirmation testing is a more sensitive test and is done to ensure the medical screening test did not yield a false positive. AMS is a Via Christi laboratory that is certified to do GCMS confirmation testing for drugs of abuse. When confirmation testing is ordered on a specimen previously tested at the Via Christi core lab, the specimen is put on a transfer list and is sent in its original container by a courier, with the transfer list, to AMS. Upon receipt of the specimen, AMS will then put their own coding on the label. He testified he has no doubt the specimen container sent to AMS and depicted in Exhibits 2 and 3 is that of the claimant because the number and bar codes match up, as well as the bar code order number.

Heather Cox, the certifying scientist and head of Toxicology at AMS, also testified on January 21, 2013. Ms. Cox has a Bachelor of Science degree in medical technology and is certified through the American Society of Clinical Pathologists. She is not a licensed health care professional. AMS is certified by the Kansas Department of Health and Environment. AMS does drug screens for a variety of clients, from probation to workplace to post accidents, random urine drug screens and medical drug screens.

Ms. Cox testified that specimens for GCMS testing normally come in a sealed bag with certain numbers on it. They will then enter that information into the L.I.S. and verify it matches the actual specimen. The computer does most of the confirmation testing, but the technician examines the results to verify that the testing was proper. The technician will run two levels of control to ensure that everything is working correctly. The technician records the test result in the L.I.S. system. The specimen is then stored in AMS's freezer for one year. As long as a frozen sample is kept at a continuous temperature, Ms. Cox testified it will normally hold the actual amount of drug that was in the specimen at the time it was collected. If there is degrading of the sample, the results would go down, not up.

Ms. Cox performed GCMS quantitative testing on November 5, 2012, which showed 48 ng/ml of Carboxy-THC, a metabolite of marijuana. The test did not show the presence of benzodiazepine. Ms. Cox explained that the earlier test may have been a false positive, or the benzodiazepine that showed up in the first test may not be one that they test for in the GCMS test. She testified that GCMS testing is at least 99% accurate.

Ms. Cox indicated if the testing is done for legal purposes rather than medical purposes, it is accompanied by a chain of custody and is normally sealed with a tamper-proof seal. Claimant's test was done for medical purposes, so it was not accompanied by a chain of custody nor did it have a tamper-proof seal on it. When questioned regarding the language "can be used only for medical purposes" referenced on the Daily Outpatient Lab Results, she testified as follows:

> Q. Now, on your test results, the paragraphs under both say that this "can only be used for medical purposes. These results should not be used for legal or employment-related decisions." And tell me, what is that about?
>
> A. That is a canned footnote that we put on every specimen that we receive that we do not have a chain of custody for because we cannot go back and track the actual specimen ourselves and say that, yes, this is the specimen.[3]

Ms. Cox believed the sample was handled in accordance with AMS's protocol, standards and procedures while in their possession. She testified there was nothing about the specimen that would cause her to have reasonable doubt that it was anything other than the sample obtained from claimant on February 22, 2012.

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[3] Cox Depo. at 16.

The remainder of claimant's urine sample is in a freezer at AMS, but there is not enough to do split testing as it amounts to less than 100 microliters.

A preliminary hearing was held on February 19, 2013, on the issue of whether or not claimant's injuries are compensable or if they are barred under K.S.A. 2011 Supp. 44-501. As noted above, on March 1, 2013, Judge Klein issued an Order, as discussed on page one of this Order. Respondent appealed.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501 (b)(1) states in part:

> (A) The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including, but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens.
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> . . .
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> (C) It shall be conclusively presumed that the employee was impaired due to alcohol or drugs if it is shown that, at the time of the injury, the employee had an alcohol concentration of .04 or more, or a GCMS confirmatory test by quantitative analysis showing a concentration at or above the levels shown on the following chart for the drugs of abuse listed:
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> Confirmatory test cutoff levels (ng/ml)
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> Marijuana metabolite[1] 15
> Cocaine metabolite[2] 150
> Opiates:
> Morphine 2000
> Codeine 2000
> 6-Acetylmorphine[4] . . . . . 10 ng/ml
> Phencyclidine 25
> Amphetamines:
> Amphetamine 500
> Methamphetamine[3] 500
>
> [1] Delta-9-tetrahydrocannabinol-9-carboxylic acid.
> [2] Benzoylecgonine.
> [3] Specimen must also contain amphetamine at a concentration greater than or equal to 200 ng/ml.
> [4] Test for 6-AM when morphine concentration exceeds 2,000 ng/ml.

(D) If it is shown that the employee was impaired pursuant to subsection (b)(1)(C) at the time of the injury, there shall be a rebuttable presumption that the accident, injury, disability or death was contributed to by such impairment. The employee may overcome the presumption of contribution by clear and convincing evidence.

(E) An employee's refusal to submit to a chemical test at the request of the employer shall result in the forfeiture of benefits under the workers compensation act if the employer had sufficient cause to suspect the use of alcohol or drugs by the claimant or if the employer's policy clearly authorizes post-injury testing.

. . .

(2) The results of a chemical test shall be admissible evidence to prove impairment if the employer establishes that the testing was done under any of the following circumstances:

(B) during an autopsy or in the normal course of medical treatment for reasons related to the health and welfare of the injured worker and not at the direction of the employer;

. . .

(3) Notwithstanding subsection (b)(2), the results of a chemical test performed on a sample collected by an employer shall not be admissible evidence to prove impairment unless the following conditions are met:

(A) The test sample was collected within a reasonable time following the accident or injury;

(B) the collecting and labeling of the test sample was performed by or under the supervision of a licensed health care professional;

(C) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;

(D) the test was confirmed by gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample;

(E) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee; and

(F) a split sample sufficient for testing shall be retained and made available to the employee within 48 hours of a positive test.

K.S.A. 44-518 states:

> If the employee refuses to submit to an examination upon request of the employer as provided for in K.S.A. 44-515 and amendments thereto or if the employee or the employee's health care provider unnecessarily obstructs or prevents such examination by the health care provider of the employer, the employee's right to payment of compensation shall be suspended until the employee submits to an examination and until such examination is completed. No compensation shall be payable under the workers compensation act during the period of suspension. If the employee refuses to submit to an examination while any proceedings are pending for the purpose of determining the amount of compensation due, such proceedings shall be dismissed upon showing being made of the refusal of the employee to submit to an examination.

ANALYSIS

Judge Klein noted that claimant's urine screen was performed in the normal course of medical treatment. Respondent's counsel argues the test was done to figure out what was in claimant's system, as a medical precaution, and for health and welfare reasons. Claimant argues there was no evidence regarding why the test was performed, including whether it related to his health and welfare.

Based on the array of tests performed by Via Christi, this Board Member concludes the urine screen was performed in the normal course of medical treatment for reasons related to claimant's health and welfare, and not at the employer's direction. As such, this Board Member reverses the preliminary hearing Order as follows:

- The plain language of K.S.A 2011 Supp. 44-501(b)(2) mandates that the result of a chemical test is admissible if the employer establishes that the test was done in the normal course of medical treatment for reasons related to the health and welfare of the injured worker and not at the direction of the employer.

- K.S.A. 2011 Supp. 44-501(b)(1)(C) states that there is a conclusive presumption that the employee was impaired due to drugs if it is shown, at the time of the injury, the employee had a GCMS confirmatory test by quantitative analysis showing a concentration at or above 15 ng/ml of marijuana metabolite, delta-9-tetrahydrocannabinol-9-carboxylic acid.

- K.S.A. 2011 Supp. 44-501(b)(1)(D) states that if the employee was impaired, there shall be a rebuttable presumption that the accident, injury, disability or death was contributed to by such impairment. The employee may overcome the presumption of contribution by clear and convincing evidence. No such evidence was presented.

The six conditions listed in K.S.A. 2011 Supp. 44-501(b)(3), based on strict reading of the statute, only apply where the employer collects a chemical test sample. Such conditions do not apply to a test that was not taken at respondent's request or direction.[4]

Claimant did not refuse to submit to a chemical test. He had the test at Via Christi. K.S.A. 2011 Supp. 44-501(b)(E) and K.S.A. 44-518 do not bar compensation.

CONCLUSIONS

This Board Member reverses Judge Klein's March 1, 2013 preliminary hearing Order. Claimant's accidental injury is not compensable based on the current record. This Board Member concludes Via Christi obtained claimant's chemical test sample for reasons related to his health and welfare. This Board Member finds that the six conditions listed under K.S.A. 2011 Supp. 44-501(b)(3) do not apply to a chemical test administered in the normal course of medical treatment for reasons related to the health and welfare of the claimant and not at the employer's direction.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Thomas Klein dated March 1, 2013, is reversed.

IT IS SO ORDERED.

Dated this _____ day of May, 2013.

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HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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[4] See *Jones v. Junction City Wire Harness*, No. 1,059,933, 2013 WL 485708 (Kan. WCAB Jan. 31, 2013) (The six conditions listed in K.S.A. 2011 Supp. 44-501(b)(3) still apply under the 2011 amendments to the Kansas Workers Compensation Act where respondent directs the medical provider to obtain a urine drug screen).

[5] K.S.A. 44-534a.

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Honorable Thomas Klein